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No. 92-1988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,
Petitioners,

v.

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONERS

JOHN C. CHRISTIE, JR.
PATRICK J. ROACH
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, DC 20036
Attorneys for Petitioners Chicago Title Insurance Co., Ticor Title Insurance Co., and Security Union Title Insurance Co.

JOHN F. GRAYBEAL
ROBERT H. TILLER
PARKER, POE, ADAMS & BERNSTEIN
One Exchange Plaza
Raleigh, NC 27602-0389
Attorneys for Petitioner Lawyers Title Insurance Corp.

DAVID M. FOSTER
MICHAEL P. GOGGIN
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Attorneys for Petitioner Stewart Title Guaranty Company

JOEL I. KLEIN *
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2445 M Street, N.W.
Washington, DC 20037-1435
(202) 775-0184
Attorneys for All Petitioners

FRANK D. TATUM, JR.
PAUL J. LAVERONI
JOHN F. YOUNG
COOLEY GODWARD CASTRO HUDDLESON & TATUM
1 Maritime Plaza
San Francisco, CA 94111
Attorneys for Petitioner First American Title Insurance Company

* Counsel of Record for All Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether a federal court may refuse to enforce the judgment in a nationwide class action certified under Rule 23(b)(1) and (b)(2) on the ground that unnamed class members have a constitutional right to opt out of any class action asserting monetary claims.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 982 F.2d 386. The opinion of the district court (Pet. App. 17a-30a) is not reported.

The decisions approving and affirming the prior class action judgment (Pet. App. 31a-77a, 78a, 79a) are reported at *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *affirmed without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988).

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1992. A timely petition for rehearing was denied on March 17, 1993. The petition for certiorari

was filed on June 15, 1993, and granted on October 4, 1993. This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE

The decision of the court of appeals refusing to honor the prior class action judgment was based on the due process clause of the Fifth Amendment to the United States Constitution, which states: "No person shall be . . . deprived of life, liberty or property, without due process of law."

The certification and settlement of the prior class action was carried out pursuant to Rule 23 of the Federal Rules of Civil Procedure, which is reprinted at Pet. App. 80a-82a.

STATEMENT

This case presents the question whether unnamed plaintiff class members have a right to opt out of a federal court class action certified under Rule 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure whenever claims for monetary relief are involved. The Ninth Circuit held that, although the Rule does not provide such a right, the due process clause of the Fifth Amendment does. On that basis, the court concluded that respondents were not bound by the judgment in a prior class action even though they were members of the settlement class in that case.

1. *The Prior Judgment.* On June 10, 1986, the United States District Court for the Eastern District of Pennsylvania entered a final judgment in the multidistrict antitrust litigation known as *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633. The judgment settled twelve separate antitrust class action lawsuits that had been filed in five different federal district courts and consolidated for pretrial proceedings pursuant to the multidistrict litigation statute, 28 U.S.C.

§ 1407.[1] The complaints in the twelve cases all sought injunctive relief and damages, charging that the petitioners in this case, six title insurance companies,[2] had conspired to fix the prices of title insurance services through their participation in state-licensed rating bureaus in thirteen states.

Under the terms of the settlement, the members of the MDL 633 class—more than 3.4 million people who had purchased title insurance over a five-year period (Pet. App. 43a)[3]—received several benefits from the defendant title insurers. These benefits included enhanced title insurance coverage for class members who were current policyholders, reduced rates on newly issued policies for class members who were not current policyholders, and undertakings by the defendants not to engage in the challenged conduct for a specified period. *Id.* at 74a-76a. In exchange, the class members released all federal and state law claims arising from any allegations that the defendants had agreed or conspired to fix the price of title insurance. *Id.* at 76a-77a.

Pursuant to Rule 23(d), the district court ordered that notice of the proposed settlement and of a hearing to en-

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[1] In addition to the Eastern District of Pennsylvania, actions had been filed in the Middle District of Pennsylvania, the Southern District of New York, the Central District of California, and the District of Oregon. Pet. App. 31a.

[2] Petitioner Stewart Title Guaranty Company's Rule 29.1 statement is set forth at Pet. App. 83a-84a. The other petitioners have no parents or subsidiaries within the Rule.

[3] The class was defined as:

> All purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985 inclusive.

Pet. App. 37.

tertain class member objections to it be published on two occasions in thirty-six newspapers, having an aggregate circulation of more than 6 million in the thirteen affected states. *Id.* at 41a n.4. Hundreds of individuals requested further information about the settlement, and several filed written objections with the court. *Id.* at 41a-42a. In addition, the Attorneys General of Montana, New Jersey, Ohio, Pennsylvania, and Wisconsin collectively filed an objection, both as purchasers of title insurance and purportedly as *parens patriae* for their residents. *Id.* at 42a. The State of Arizona (also on its own behalf and as *parens patriae*) asserted a right to opt out of the case. *Ibid.*

After a hearing, the district court approved the settlement. The court first ruled that the case was appropriate for class action treatment. It analyzed each of the four "prerequisites" to class certification set forth in Rule 23(a) —numerosity, typicality, commonality, and adequacy of representation—and concluded that they were satisfied. Pet. App. at 43a-47a. The court emphasized that "[t]he primary legal issues in this case are whether plaintiffs' antitrust claims are barred by the state action defense, the McCarran-Ferguson Act and the filed tariff doctrine; or conversely, whether joint filing of rates by the defendant-competitors through rating bureaus as approved by state law, violates the prohibition against price-fixing combinations under the federal antitrust laws." *Id.* at 44a.

The court further ruled that the class should be certified under sections (b)(1)(A) and (b)(2) of Rule 23. Pet. App. 47a-50a. It found that (b)(1)(A) was appropriate because there is "a serious risk that courts in separate actions could impose inconsistent obligations on the defendants [with respect to their rating bureau activities]." Pet. App. 48a. And it found that the requirements of section (b)(2) were satisfied because plaintiffs had challenged "defendants' rating bureau activities; activities which are generally applicable to the proposed class" and

therefore injunctive relief, if awarded, would apply to "the class as a whole." Pet. App. 49a.

Next, the district court rejected Arizona's claim that it had a right to opt out of the settlement, concluding that Rule 23 did not provide such a right in (b)(1) and (b)(2) cases and that the due process rights of class members were "adequately protected by the Rule 23 requirements that the class be adequately represented by the representative plaintiffs and by qualified counsel, that the class receive some adequate form of notice of the proposed settlement and that the court approve the settlement only if it is fair, adequate and reasonable." *Id.* at 51a. The court also refused to grant opt out rights as a matter of discretion on the ground that the provision of such rights would undo the settlement and thus "go against the strong public policy in favor of settlement of class actions." *Id.* at 51a-52a.[4]

The State of Arizona appealed to the Third Circuit, arguing that, because the settlement had resolved monetary claims, the due process clause, as interpreted in *Phillips Petroleum Co. v. Shutts ("Shutts")*, 472 U.S. 797 (1985), required that unnamed class members be allowed to opt out. The court of appeals affirmed without opinion. *In re Real Estate Title & Settlement Serv. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1987) (Pet. App. 78a). Arizona then unsuccessfully sought review in this Court, raising the same due process argument under *Shutts*. *Arizona v. Chicago Title Ins. Co.*, 485 U.S. 909 (1988) (Pet. App. 79a).

2. *The Proceedings Below.* The present case is one of three that have been brought as collateral attacks on

[4] The court went on to approve the settlement, finding that it was "fair, adequate, and reasonable" under the nine-factor test set out in *Girsh v. Jepson*, 521 F.2d 153, 156-57 (3d Cir. 1975). Pet. App. 53a-72a.

the judgment in MDL 633.[5] The complaint was filed in April 1990 in the United States District Court for Arizona, seeking injunctive relief and damages from the same six title insurers who were the defendants in MDL 633. The claims were brought by one plaintiff from Arizona and one from Wisconsin (two of the thirteen states at issue in MDL 633) on behalf of an alleged class of purchasers of title insurance services in those states. As in MDL 633, the plaintiffs asserted that the defendants had conspired to fix prices for such services in violation of the federal antitrust laws.

The defendants moved for summary judgment on the ground that the judgment in MDL 633 was binding on the plaintiffs under the doctrine of *res judicata*. The district court granted the motion, holding that plaintiffs were within the class in MDL 633, that they had been ade-

[5] At the same time that it was actively pursuing its appeal, the State of Arizona filed a state court suit on behalf of Arizona purchasers of title insurance, asserting state antitrust claims against the same defendants arising from the same conduct at issue in MDL 633. The title insurers moved in the MDL 633 court to enjoin the prosecution of this state court suit on *res judicata* grounds, but the Third Circuit, reversing the district court, held that the *res judicata* effect of the MDL 633 judgment should be raised as a defense in the state court. *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.), *cert. denied* 493 U.S. 821 (1989) (J.A. 13-33). The title insurers later sought and obtained dismissal of the state case on *res judicata* and substantive state law grounds; the state court dismissal was affirmed on appeal on substantive grounds without reaching the *res judicata* issue. *Tucson Unified School Dist. v. Chicago Title Ins. Co.*, 804 P.2d 843 (Ariz. Ct. App. 1991).

A second state court suit filed in Wisconsin, asserting state antitrust claims on behalf of Wisconsin title insurance purchasers against the MDL 633 defendants and other title insurers, was dismissed in the trial court on *res judicata* and substantive grounds. *Prentice v. Title Ins. Co.*, No. 89-CV-012004 (Circuit Ct., Milwaukee Cty.). The Wisconsin Supreme Court affirmed the trial court's dismissal on substantive grounds without reaching the *res judicata* issue. *Prentice v. Title Ins. Co.*, 500 N.W.2d 658 (Wis. Ct. App. 1993).

quately represented in that case, and that the judgment did not violate due process. Pet. App. 20a-28a. The court specifically rejected plaintiffs' claim, relying on *Shutts*, that "the MDL 633 court did not have personal jurisdiction over Arizona and Wisconsin residents," and that therefore they had to "be permitted to opt-out before being bound by the MDL 633 class." *Id.* at 26a. The court ruled that *Shutts* was distinguishable because it "is limited to claims for money damages," while the settlement in MDL 633 provided "equitable relief." *Id.* at 27a.[6]

The Ninth Circuit reversed. Although it agreed with the district court that the plaintiff class in MDL 633 (including those members pursuing this action) had been adequately represented by the named plaintiffs and their counsel in that case (*id.* at 8a-11a), and although it did not question the adequacy of the notice and opportunity to object in MDL 633 or the certification of the case under Rule 23(b)(1) and (2), the court of appeals nonetheless ruled that the judgment in MDL 633 was not binding with respect to the class members' damages claims. The court read *Shutts* to require that class members be given a due process right to opt out of a class action "if monetary claims are involved." *Id.* at 12a (citing 472 U.S. at 812).[7] It then characterized MDL 633 as a

[6] The court also concluded that, even if *Shutts* applied, procedural due process was satisfied because "[g]iven the complexity of the MDL 633 litigation, notice of the settlement by publication and the opportunity to object" were sufficient. *Id.* at 27a-28a.

[7] Although the court's opinion is unclear, it appears that the Ninth Circuit intended to limit this due process right to unnamed class members who lack minimum contacts with the State in which the federal court conducting the class action sits. Respondents and the district court both had framed the issue in such jurisdictional terms. *See* note 9, *infra*. And early in its opinion, the Ninth Circuit, while describing a Third Circuit case refusing to enjoin a collateral challenge to MDL 633, observed that the court had held that, absent opt out rights, "the class member must have either 'minimum contacts with the forum or consent to jurisdiction in order to be enjoined by the district court that entertained the

" 'hybrid suit that involved the *foreclosure of substantial damages claims*' " (*id.* at 12a (quoting *In re Real Estate*, 869 F.2d at 768) (emphasis added by Ninth Circuit)), and concluded that the plaintiffs in this case could relitigate the damages claims at issue in MDL 633 but that they were bound by the injunctive relief provided in that case.[8]

SUMMARY OF ARGUMENT

The due process clause does not require a federal court to provide opt out rights in a nationwide class action involving monetary claims under Rule 23(b)(1) or (b)(2) of the Federal Rules of Civil Procedure. The Constitution allows a federal court to assert jurisdiction over out-of-state class members; and fundamental fairness for all unnamed class members (in-staters and out-of-staters) is assured by requiring that their interests must have been adequately represented by the named plaintiffs before they can be bound by the class action judgment.

1. Federal courts need not provide opt out rights in order to assert jurisdiction over out-of-state class members. The due process clause does not restrict the jurisdiction of federal courts to parties having minimum contacts with the forum state, but allows instead for assertions of federal court jurisdiction on a nationwide basis. *See, e.g.,*

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class action.'" Pet. App. at 4a (quoting *In re Real Estate*, 869 F.2d at 769). Nevertheless, when it came to its legal discussion and the statement of its holding, the Ninth Circuit made no reference to jurisdictional limits, thus raising the possibility that it meant to rule more broadly and require opt out rights for all unnamed class members, in-staters as well as out-of-staters.

[8] The court of appeals also rejected two merits contentions advanced by petitioners in support of summary judgment. It found that respondents' state-action defense to the antitrust claims was unavailing (*id.* at 8a-9a) and that the filed rate doctrine (*see Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922)) was inapplicable on the facts presented (*id.* at 15a-16a). This Court denied certiorari on these issues.

United States v. Union Pac. R.R., 98 U.S. 569, 604 (1878). Rule 23, in turn, permits the federal courts to employ the full extent of that power in certifying nationwide class actions pursuant to its provisions. *See Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979).

Contrary to the Ninth Circuit's view, this Court's decision in *Shutts* does not require a different conclusion. *Shutts* involved a state court class action, and the jurisdictional power of state courts *is* limited to parties having minimum contacts with the forum state. In view of that due process restriction, an opt out right is required in a state court class action as a means of securing *consent* to jurisdiction by out-of-state class members. *Shutts*, 472 U.S. at 812-13. Because federal courts do not need consent to assert jurisdiction over such out-of-staters, they do not need to provide them opt out rights.

2. The more general due process right to "fundamental fairness" likewise is not violated by the failure to provide opt out rights in a Rule 23(b)(1) or (b)(2) class action involving monetary claims. It is well-settled that class actions are "an exception to the general rule [on claim preclusion]"; when properly conducted, they can bind a person who, "although not a party, has his interests represented by someone who is a party." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *see Hansberry v. Lee*, 311 U.S. 32 (1940). In accord with this recognition, Rule 23 plainly authorizes mandatory class actions under sections (b)(1) and (b)(2) that include claims for monetary relief, and this Court and the lower federal courts repeatedly have upheld such class actions. *See, e.g., Califano v. Yamasaki, supra* (social security benefits). Indeed, the practice goes back well over a hundred years to this Court's first class action decision, which affirmed the judgment in a case involving mandatory classwide adjudication of monetary claims. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1854).

The constitutional validity of mandatory class actions that include damages claims is also confirmed by a straightforward application of the three-factor balancing test used by the Court for assessing due process claims. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). As for the first factor—the individual interest at stake—an unnamed plaintiff's desire to opt out is not entitled to much weight because the individual's ability to direct and control complex litigation is realistically quite limited. In any event, there is certainly nothing about the ability to control the litigation of a monetary claim that would support a sensible constitutional distinction between it and an injunctive claim, as the Ninth Circuit held. Quite obviously, both in terms of ultimate importance and in terms of dollar value, a claim for injunctive relief can be every bit as significant as a claim for monetary relief.

The second *Mathews* factor—the likelihood that the claimed procedural right will decrease the risk of an erroneous deprivation of property (here, the plaintiffs' claim for damages)—adds no weight to respondents' side of the balance. The touchstone of due process in class actions is the assurance that unnamed class members have been adequately represented before they can be bound. *Hansberry*, 311 U.S. at 44-46. That assurance is pervasively protected, first by the procedures of Rule 23, and second by the fact that unnamed class members are entitled to an individualized determination of adequacy (in a separate proceeding). In these circumstances, the right of individual control over litigation does not enhance the likelihood that the unnamed plaintiff's claim will be accurately resolved.

Finally, the third *Mathews* factor—the interests arrayed against the individual's claim to be able to opt out—are substantial. A mandatory class action eliminates repeated, duplicative litigation that is sure to be inefficient and likely to lead to unfair, inconsistent results.

Such a class action also significantly increases the likelihood of settlement by enabling the defendant to resolve a set of common claims once and for all, thus benefiting the court, the defendant, and, significantly, unnamed class members who do not want to opt out but would rather have their claims decided in the class action.

A fair balance of these factors demonstrates that the individual interest in separately litigating monetary claims is too weak to outweigh the competing interests in systemic efficiency and fairness. Due process, therefore, does not require an opt out right in class actions presenting a claim for monetary relief.

ARGUMENT

The Ninth Circuit incorrectly held that respondents were not fully bound by the judgment in MDL 633 because they were denied due process by the court's failure to allow them to opt out and separately try their damages claims. The due process clause (of the Fifth as well as the Fourteenth Amendment) imposes two kinds of limitations on judicial proceedings: one as to jurisdictional power (can the court compel submission to its authority); and the other as to procedural fairness (do the tribunal's processes provide an acceptable means for adjudicating disputes). Neither constitutional limitation is transgressed by a mandatory federal class action like the one in MDL 633.[9]

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[9] As indicated above (*see* note 7, *supra*), although the Ninth Circuit appears to have based its decision on the jurisdictional dimension of due process, its opinion is not entirely clear on the issue. As for respondents, they rested their due process argument below on the assertion that *Shutts* applied to "an absent plaintiff from outside the forum state." C.A. Br. of Appellants at 25; *see also* Pet. App. 26a ("Plaintiffs . . . argue that due process was violated because the MDL 633 court did not have personal jurisdiction over Arizona and Wisconsin residents") (district court opinion). In their opposition to certiorari, however, respondents

I. A FEDERAL COURT HAS THE JURISDICTIONAL POWER TO RESOLVE THE CLAIMS OF CLASS MEMBERS THROUGHOUT THE UNITED STATES WITHOUT PROVIDING A RIGHT TO OPT OUT.

The basic constitutional principles governing jurisdiction over parties are well-established: within its jurisdictional reach, a court can compel a party to participate in its processes and be bound by its judgments; but outside that reach, a court can act only if the party agrees to subject itself to the court's authority. *See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 703-04 (1982); *Pennoyer v. Neff,* 95 U.S. 714, 724-26 (1877). The key to this case, we submit, is that those principles apply differently to state and federal courts, because the due process clause imposes different limits on their respective jurisdictional powers. State courts only can assert jurisdiction over parties having minimum contacts with the state. *See, e.g., International Shoe Co. v. Washington,* 326 U.S. 310 (1945). But the Constitution allows federal courts to exercise adjudicatory power at least with respect to all persons and property located in the United States. This core distinction simultaneously explains why the Court in *Shutts* insisted on an opt out right in a nationwide *state* court class action and why such a right is unnecessary in a *federal* court class action: the former requires the consent of out-of-state class members to decide their claims, whereas the latter does not.

1. It is well-established that the Constitution does not limit the jurisdiction of the federal courts over parties located in the United States and, therefore, Congress may provide that any federal court "shall, by process served anywhere in the United States, have the power to bring

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changed course, contending that "*Shutts* did not distinguish between absent *resident* class members and absent *non-resident* class members; the distinction was between absent *plaintiffs* and absent *defendants.*" Opp. at 8.

before it all the parties necessary to its decision." *United States v. Union Pac. R.R.,* 98 U.S. 569, 604 (1878). This Court recognized that basic proposition early in our history. *See Toland v. Sprague,* 37 U.S. (12 Pet.) 300, 328 (1838); *see also Picquet v. Swan,* 19 F. Cas. 609 (C.C.D. Mass. 1828) (No. 11,134) (Story, J., sitting by designation); *Ex parte Graham,* 10 F. Cas. 911 (C.C.E.D. Pa. 1818) (No. 5,657) (Washington, J., sitting by designation). And it has reiterated the point on several occasions since. *See Robertson v. Railroad Labor Bd.,* 268 U.S. 619, 622 (1925); *Mississippi Publishing Corp. v. Murphree,* 326 U.S. 438, 442 (1946).

Based on this well-settled dictum, the lower federal courts consistently have rejected due process challenges to the numerous federal statutes that authorize nationwide jurisdiction. *See, e.g., Semegen v. Weidner,* 780 F.2d 727, 730 (9th Cir. 1985) (federal securities laws); *FSLIC v. Provo Excelsior Ltd.,* 664 F. Supp. 1405, 1421-22 (D. Utah 1987) (same); *United States v. International Bhd. of Teamsters,* 708 F. Supp. 1388, 1402-03 (S.D.N.Y. 1989) (RICO); *Entek Corp. v. Southwest Pipe & Supply Co.,* 683 F. Supp. 1092, 1096 n.4, 1100 (N.D. Tex. 1988) (antitrust); *Hetchkop v. George Harms Excavating Corp.,* No. 92 Civ. 2239 (JFK), 1993 U.S. Dist. LEXIS 3637 (S.D.N.Y. 1993) (ERISA); *Waste Management, Inc. v. Uniroyal, Inc.,* No. 91-C-1020-S, 1992 U.S. Dist. LEXIS 12003 (W.D. Wis. 1992) (CERCLA); *In re WWG Indus., Inc.,* 44 B.R. 287, 290 (N.D. Ga. 1984) (bankruptcy); *Max Daetwyler Corp. v. R. Meyer,* 762 F.2d 290, 294 n.3 (3d Cir.), *cert. denied,* 474 U.S. 980 (1985) (interpleader); *In re Agent Orange Product Liab. Litig.,* 818 F.2d 145, 163 (2d Cir. 1987), *cert. denied,* 484 U.S. 1004 (1988) (multidistrict transfers).

This uniform body of precedent reflects the essential constitutional recognition that a sovereign must be able to extend the jurisdictional reach of its courts, at the very

least, to people who live within its borders. Indeed, that much was established before, and reaffirmed in, this Court's first due process case involving state court jurisdiction, *Pennoyer v. Neff*, 95 U.S. 714 (1877). As the Court there explained, " '[w]here a party is within a territory, he may justly be subjected to its process and bound personally by the judgment pronounced on such process against him.' " *Id.* at 724 (quoting *Picquet v. Swan*, 5 Mass. 35 [19 F. Cas. 609 (1828)] (Story, J.); *see also McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power.").

The conclusion that federal court jurisdiction can extend nationwide is in no way undermined by the fact that there are federal district courts located in every state. That is a matter of convenience, not constitutional significance. Under Article III, Congress plainly could choose to establish a single federal district court with nationwide jurisdiction. *See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (Emergency Court of Appeals with nationwide jurisdiction upheld on ground that "Article III left Congress free to establish inferior federal courts or not as it thought appropriate"). And, of course, the Constitution confers national jurisdiction on this Court, both original and appellate, further suggesting that such power could be given to the lower federal courts without offending due process. *See also Union Pacific*, 98 U.S. at 603 (Congress has provided that "[t]he jurisdiction of the Supreme Court and the Court of Claims is not confined by geographical boundaries").

Nor is it relevant to the present case that recent decisions involving the application of the "minimum contacts" rule in the context of state court jurisdiction have emphasized that the test should be applied with an eye toward "protect[ing] the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-

92 (1980); *see also Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. at 702-03 & n.10. That consideration affects only the permissible limits on extensions of jurisdictional power *beyond* the people who live within a jurisdiction's borders: it is absolutely clear, for example, that Alaska (like Delaware) can require its residents to litigate in any court statewide, no matter how inconvenient. *Cf. Burlington N. R.R. v. Ford*, 112 S. Ct. 2184 (1992) (corporation with headquarters in one county of Montana subject to jurisdiction anywhere in the state). By the same token, such considerations of convenience, if relevant at all to the federal courts, can be brought to bear on assertions of jurisdictional power only *outside* the United States. *See Omni Capital Int'l, Inc. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (leaving open question whether a foreign defendant's "contacts with the Nation as a whole" provides a constitutional basis for jurisdiction); L. Brilmayer & C. Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 Harv. L. Rev. 1217 (1992) (emphasizing importance of foreign policy concerns to this analysis). Those extra-territorial issues are not raised by this case.

2. The constitutional conclusion that federal courts have nationwide jurisdictional power is sometimes obscured by the fact that such power generally is not used because Rule 4(e), Fed. R. Civ. P., states that, unless Congress provides otherwise, service of process is limited by the applicable "statute or rule of court of the state in which the district court is held." *See also* cases cited at p. 13, *supra* (noting territorial scope of federal court power while holding that Congress had not authorized its full use). That self-imposed, non-constitutional limit on service of process typically restricts which *defendants* can be brought into a case (except in the circumstances, cited at p. 13, *supra*, where Congress, with increasing frequency, has allowed nationwide service). But Rule 4(e)

has no application to the appropriate scope of plaintiff class actions, which are governed by a different Federal Rule, Rule 23.[10]

That Rule imposes no restrictions on the jurisdictional reach of the federal courts, and there is thus no reason to suppose that anything but full constitutional authority is available in certifying class actions under the Rule. This Court has already recognized as much: "Nothing in Rule 23 . . . limits the geographical scope of a class action that is brought in conformity with that Rule. . . . [Consequently,] certification of a nationwide class, like most issues arising under Rule 23, is committed in the first instance to the discretion of the district court." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979). And the lower federal courts have frequently invoked this discretion, certifying numerous national and multi-state class actions under all three subcategories ((b)(1), (b)(2), and (b)(3)) of Rule 23. *See, e.g., In re Drexel Burham Lambert Group,* 960 F.2d 285 (2d Cir. 1992), *cert. dismissed,* 113 S. Ct. 1070 (1993); *Lynch v. Rank,* 604 F. Supp. 30, 38-39 (N.D. Cal.), *aff'd,* 747 F.2d 528 (9th Cir. 1984), *modified on other grounds,* 763 F.2d 1098 (9th Cir. 1985); *Mertz v. Harris,* 497 F. Supp. 1134, 1138 (S.D. Tex. 1980); *Dale Elecs., Inc. v. R.C.L. Elecs., Inc.,* 53 F.R.D. 531, 534 (D.N.H. 1971).[11]

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[10] It is worth noting here that Congress has provided nationwide service of process with respect to corporate defendants in antitrust cases. 15 U.S.C. § 22. This provision further suggests that Congress did not want to curtail the jurisdictional reach of the federal courts with respect to plaintiff class members raising antitrust claims like those at issue in MDL 633.

[11] There is an additional legal basis that independently supports the exercise of nationwide jurisdiction over unnamed class members in MDL 633. That case was consolidated pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407(f), which authorizes the entry of final judgment, prior to trial, on the basis of settlement (as occurred here) as well as on grounds of dismissal or summary judgment. *See* Rule 14, Rules of Procedure of the Judicial Panel on Multidistrict Litigation; 28 U.S.C. § 1407(f). *See also In re Donald J. Trump Casino Sec. Litig.,* No. 92-5350, 1993 U.S. App. LEXIS 26691, at *15-17 (3d Cir. 1993). The multidistrict statute is self-evidently nationwide in its coverage and, therefore, it provides explicit congressional authorization for the MDL 633 court to have exercised its full jurisdictional power by entering a binding nationwide settlement. *See In re Agent Orange Product Liab. Litig.,* 818 F.2d at 163 (jurisdiction over nationwide class proper because 28 U.S.C. § 1407 " 'provide[s] for service of process anywhere in the United States' ") (quoting *Mississippi Publishing Corp.,* 326 U.S. at 442); *see also In re FMC Corp. Patent Litig.,* 422 F. Supp. 1163, 1165 (J.P.M.L. 1976) (citing cases).

3. These fundamental principles of jurisdictional power demonstrate why the Ninth Circuit's reflexive application of the *Shutts* opt out requirement to federal court class actions like this one was mistaken. *Shutts* involved a state court class action that sought to adjudicate the claims of out-of-state plaintiffs who had no minimum contacts with the forum State. The only way a state court can constitutionally adjudicate such claims is with the consent of the out-of-state plaintiffs. *See, e.g., International Shoe Co. v. Washington,* 326 U.S. 310 (1945). Accordingly, the Court in *Shutts* expressly defined the "essential question" in the case as "how stringent the requirement for a showing of consent will be." 472 U.S. at 812. The Court then concluded that an opt out provision is stringent enough to establish consent, reasoning that "the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an 'opt out' form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so." *Id.* at 813. *See In re Drexel Burnham Lambert Group, Inc.,* 960 F.2d at 292 ("*Shutts* mandates that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff") (citing 472 U.S. at 811-12).

The *Shutts* analysis is simply irrelevant to a federal class action. Because the Constitution does not disable a federal court from compelling anyone in the country to submit to its jurisdiction under Rule 23, the court has no need to secure consent from any such person before it can adjudicate his or her claim. It follows that there is no constitutional basis for requiring an opt out right designed to provide such consent. The Ninth Circuit's contrary conclusion was incorrect.

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE THAT UNNAMED CLASS MEMBERS WHO ARE WITHIN A COURT'S JURISDICTIONAL REACH BE GIVEN A RIGHT TO OPT OUT IN CASES INVOLVING A CLAIM FOR MONETARY RELIEF.

Once a court establishes its jurisdictional power over a litigant, the due process clause then requires that the procedures it uses for adjudicating his or her claim "ensure 'fundamental fairness.'" *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). This aspect of due process likewise is not violated by the failure to provide opt out rights in a properly certified class action. Class actions provide a fair and efficient way to adjudicate numerous essentially identical claims. Their constitutional legitimacy—in cases involving monetary as well as injunctive relief—turns on an assurance that the named plaintiffs have adequately represented the interests of unnamed class members, and not on the consent of each individual class member, expressed through the failure to exercise an opt out right.

1. The Ninth Circuit's holding that due process requires an opt out right in class actions involving monetary claims upsets a well-established and widely-used practice. Rule 23(b)(1) and (b)(2) specifically do not provide such a right, and yet it is clear that both sections intend to cover monetary claims. As for section (b)(1), the

Advisory Committee expressly stated that it applies, *inter alia*, to "claims . . . made by numerous persons against a fund insufficient to satisfy all claims." Rule 23, Adv. Comm. Notes Subdivision (b)(1), Clause B. Similarly, monetary claims may also be entertained under section (b)(2), so long as the injunctive claims are "predominant[]." *Id.* at Subdivision (b)(2). Consistent with these expressed intentions, this Court and the lower federal courts have frequently upheld mandatory class actions that included monetary claims. *See, e.g., Califano v. Yamasaki, supra* (social security benefits under (b)(2)). *See also* 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, § 1773-74, at 427-47 (1986) (citing numerous (b)(1) class actions involving monetary claims); *id.* § 1775, at 466 n.24 (citing numerous (b)(2) cases involving monetary claims).

These well-established practices reflect the fact, recognized almost from the beginnings of our Republic, that class actions are an "exception to the general rule [of *res judicata*]," which normally requires that an individual be a party to a lawsuit before he or she can be bound by its judgment. *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989) ("a person, although not a party, has his interests adequately represented by someone with the same interests who is a party"). Thus, well over a hundred years ago the Court ruled—in a case involving monetary claims against a church by secessionist ministers—that "[w]here the parties are very numerous, and though they have or may have separate and distinct interests, yet it is impractical to bring them all before the court . . . [t]he decree [in a class action] binds all of them the same as if all of them were before the court." *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302-03 (1854) (citing J. Story, *Equity Pleadings*). Nor was this principle limited to injunctive claims, as the *Smith* case itself illustrates. On the contrary, class actions "involving money claims were adjudicated in equity as a matter of course from early

times." Z. Chafee, *Some Problems of Equity* 285 (U. Mich. L. 1950).[12]

The Court has reaffirmed these basic principles on numerous occasions, without ever suggesting (except in the jurisdictional context of *Shutts*) that opt out rights must be provided in order to bind unnamed plaintiffs by the judgment in a properly conducted class action. To the contrary, the Court has flatly stated that, "[i]f the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree, when rendered, *must bind all of the class properly represented.*" *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921) (emphasis added). *See also Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984); *Hansberry v. Lee*, 311 U.S. 32 (1940); *Sovereign Camp of Woodmen of the World v. Bolin*, 305 U.S. 66 (1938); *Hartford Life Ins. Co. v. Barber*, 245 U.S. 146 (1917); *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662 (1915); *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531 (1915).

Given this history, it is hardly surprising that, prior to the Ninth Circuit's misapplication of the jurisdictional holding in *Shutts*, the lower federal courts consistently had rejected the contention that due process requires an

[12] Because class actions were developed in the equity courts, they were not used in legal damages actions when the distinction between the two systems was rigidly observed. Nevertheless, more than sixty years ago Professor Chafee was able to observe that while "[t]he older cases granted only the injunction and held that the claims for damages by or against numerous persons must be tried in separate actions at law, . . . [r]ecent decisions . . . show an inclination to assess compensation in the unified proceeding, applying the principle that equity once having taken jurisdiction will wind up the whole controversy. Of course, if the problems of damages were very difficult, the balance of convenience would favor separate jury trials; but often damages can be assessed mechanically or on the basis of facts already ascertained during the hearings on the injunction." Z. Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297, 1329 (1932) (footnotes omitted).

opt out right in class actions certified under Rule 23(b)(1) and (b)(2) that include monetary claims. *See, e.g., Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 (5th Cir. 1981) (back pay; argument "that the settlement agreement violated [class members'] right to due process because it did not provide them a means of opting out . . . is without merit"); *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 393 (3d Cir. 1981) (back pay; "due process [does] not require receipt of a pre-judgment opportunity to opt out"); *Robertson v. National Basketball Ass'n*, 556 F.2d 682, 686 (2d Cir. 1977) (damages; "(b)(1) settlement does not violate due process").

In short, when it comes to the use of mandatory class actions in circumstances like those at issue here, it can fairly be said that "[their] validation is [their] pedigree." *Burnham v. Superior Court*, 110 S. Ct. 2105, 2116 (1990) (opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy, J.).

2. The constitutional legitimacy of mandatory class actions that include monetary claims is also confirmed by a full-scale application of the balancing test generally used by this Court to assess due process arguments. *See Mathews*, 442 U.S. at 335; *Connecticut v. Doehr*, 111 S. Ct. 2105, 2112 (1991) (modifying *Mathews* test for application to procedures used in private-party disputes). This test requires an analysis of three factors: (1) the interest of the party asserting the due process claim; (2) the likelihood that the proposed procedure will decrease the risk of an erroneous deprivation of property; and (3) the interests of other parties affected by the procedure, as well as the government's interest in providing or not providing it. Applied to this case, this analysis demonstrates that the interests arrayed against an opt out right for monetary claims in (b)(1) and (b)(2) class actions strongly outweigh the interests in favor of such a right.

a. The individual interest advanced by respondents in this case is to maintain control over the litigation of their

damages claims (though not over their injunctive claims, which they concede are properly amenable to mandatory classwide disposition). Even in absolute terms, but certainly in relative terms, this interest is not very weighty in a properly certified class action where the unnamed plaintiff is "adequately and fairly represented" by the named plaintiffs. When this representational requirement is satisfied, in fact, the individual's interest in controlling either injunctive or monetary claims does not even bear on the accuracy of the adjudicatory process. *See* pp. 24-26, *infra*.

To start with the broader issue, the reality is that individuals rarely can or do exert much control over the trial of claims that turn on generic legal or factual issues. As Judge Spencer Williams of the United States District Court for the Northern District of California has observed, "[a]lmost everyone who has had contact with plaintiffs of tort litigation at the trial court level would admit that, ultimately, everyone and everything *but* the injured plaintiff controls the litigation." S. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 330 n.23 (1983). Notably, in this very case, although respondents assert a right to opt out of one class action, they nevertheless seek to proceed by using another. That is an effort predicated not on protecting the individual's interest in controlling litigation, but simply in getting another bite at the apple.

In any event, it is clearly implausible to suggest that the individual's interest in controlling litigation applies to monetary, but not injunctive, claims, as respondents and the Ninth Circuit do. *See* Pet. App. 12a ("[respondents] will be bound by the injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or future injunctive relief in this case"). Certainly, there is no principled basis for concluding, other than on a case-by-case (or, perhaps, individual-by-individual) basis, which type of relief is more important. For example, there

are damages cases involving amounts that matter little, if at all, to the individual and that are brought as class actions precisely because it would be too expensive to litigate the claims individually. *See, e.g., Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.") By contrast, there are injunctive cases that involve issues of critical importance to unnamed plaintiffs, such as where children go to school (*see, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971)), or under what terms and conditions professional athletes earn their living (*see, e.g., Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977)), or whether employees have been discriminated against and therefore are eligible to be hired or promoted (*see, e.g., East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395 (1977)). Yet, under the Ninth Circuit's view, the latter (injunctive) cases, but not the former (damages) cases, are subject to mandatory classwide adjudication.

Similarly, there is no reason to suppose that, somehow, an individual is able to bring more to bear on the litigation of a monetary claim than on the litigation of an injunctive claim. That, too, depends on the particulars of a given case and, ultimately, on the capacity of the named plaintiffs to fairly and adequately represent unnamed class members. *See* p. 24, *infra*. But when a class is truly cohesive and the named plaintiffs are able to litigate the case fairly and competently, as Rule 23(b)(1) and (b)(2) require, there is simply nothing about the adjudication of a monetary claim to indicate that the individual's direct involvement is more important in that situation than it would be with respect to an injunctive claim.

b. The second *Mathews* factor, which looks to the effect of the disputed procedure on the risk of an erroneous deprivation, is entitled to little, if any, weight here. Given the existing procedural protections in class actions conducted in accordance with the provisions of Rule 23, it cannot reasonably be argued that the addition of opt out rights as a due process mandate would decrease the likelihood of an incorrect decision. Rather, the key to the accuracy of classwide adjudication is the assurance that the named plaintiffs fairly and adequately represent unnamed class members, an assurance that is amply provided by Rule 23 and existing constitutional protections.

The first thing that Rule 23 does to protect the requirement of adequate representation is to provide criteria that ensure a strong identity of interest between the named and unnamed class members. Thus, the named plaintiffs must show that there are "questions of law or fact common to the class" (23(a)(2)), and that their claims are "typical of the claims . . . of the class" (23(a)(3)). They must also show that they "will fairly and adequately protect the interests of the class" (23(a)(4)). That requirement reinforces the need for an identity of interest (and thus an absence of conflict) between the named and unnamed class members. And as the MDL 633 court's application of the requirement shows (Pet. App. 46a-47a), adequacy of representation also demands sufficient commitment, financial capacity and, most importantly, the competence of class counsel.

In addition to providing criteria designed to foster adequate representation, Rule 23 requires the district court to play a special role in protecting this right. In this important respect, "from the plaintiffs' point of view, a class action resembles a 'quasi-administrative proceeding, conducted by the judge.'" *Shutts*, 472 U.S. at 809 (quoting 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.45 [4.-5] (1984) (other citations omitted)). *See also Shutts*, 472 U.S. at 809 (district court has obligation

to inquire into "any other matters that will bear upon proper representation of the absent plaintiffs' interest") (citations omitted). The court has at its disposal a variety of procedural devices to carry out this assignment, including the ability to limit the issues that can be tried on a classwide basis (23(c)(4)), to create subclasses where necessary (*ibid.*), and to impose conditions on the named plaintiffs or on any plaintiff-intervenors (23(d)(3)). Moreover, the court may, "for the protection of the members of the class . . . [require] that notice be given in such manner as the court may direct to some or all of the [class] members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action" (23(d)(2)).[13] And if a class action is settled, as MDL 633 was, the court must determine whether the settlement is "fair, adequate, and reasonable," after requiring that notice be provided and that class members be given an opportunity to object to the disposition (23(e)). *See* Pet. App. 31a-77a.[14]

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[13] *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950) ("notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objections sustained would inure to the benefit of all"); *Restatement (Second) of Judgments*, § 41, comment (e), at 404 (1980) ("The process of examining th[e] competence [of the representative parties] may be accompanied by notice to the class, or its salient members, and affording them opportunity to dispute the representative's fitness.") (citations omitted).

[14] This case presents no issue concerning whether due process requires notice to unnamed class members in a mandatory class action. Respondents raised no such claim in the lower courts; and, in any event, the MDL 633 court required widespread newspaper notice throughout the affected states, with the result that several objectors came forward and fully litigated the issue of adequate representation, among others, in the MDL 633 proceedings. Pet. App. 41a-42a.

Finally, even with the extensive protections provided by Rule 23, no unnamed class member can be conclusively bound by the judgment without being given the opportunity to contest the adequacy of representation in a separate action; and if the court in that separate action finds an absence of adequate representation, the plaintiff is free to litigate his or her claim anew. That due process right, established by this Court more than fifty years ago in *Hansberry v. Lee*, has been enforced by the lower federal courts. *See, e.g., Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973); *In re Four Seasons Sec. Laws Litig.*, 59 F.R.D. 657 (W.D. Okla. 1973). In a real sense, then, an unnamed plaintiff already has the right to opt out of a class action—even after it is over—if his or her individual interest was not properly protected in the case.[15]

In these circumstances, it is difficult to see how an opt out right could further decrease the likelihood of an erroneous deprivation. The requirement of an identity of interests between named and unnamed plaintiffs, the assurance of adequate resources and qualified counsel, the unique role of the court in looking after the interests of unnamed class members, and the ultimate opportunity to dispute adequacy in a second proceeding all contribute to making the likely accuracy of a class action decision particularly high. Individual control over separate litigation adds nothing significant to (and does not itself include any of) these protections.

c. On the other side of the *Mathews* balance are the systemic interests in efficiency and fairness that are promoted by mandatory class actions. Most significantly, of

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[15] Respondents in this case did in fact challenge the binding effect of the judgment in MDL 633 by arguing that their interests were not properly protected by the named plaintiffs in that case. The Ninth Circuit rejected the claim, concluding that respondents had "fail[ed] to present facts which indicate a lack of adequate representation." Pet. App. 9a; *see also* Pet. App. 20a-25a (district court rejection of respondents' adequacy contention).

course, is the interest in avoiding multiple litigation of essentially the same claim. The burdens of such repeated litigation can be very high, clogging the federal courts and causing defendants to bear these heavy litigation costs in case after case. It is common knowledge that mass tort cases in areas like asbestos, where Rule 23 currently does not permit mandatory class actions, are almost incapacitating some federal courts. *See, e.g., Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 652 (E.D. Tex. 1990) ("[i]f the court could somehow close thirty cases a month, it would take six and one-half years to try these cases and there would be pending over 5,000 untouched cases at the present rate of filing."). Similarly, the allowance of separate actions depletes the resources of defendants that could sensibly go to paying victims instead of the legal fees of counsel for both sides. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 802 (E.D.N.Y. 1991) ("[a]djudication on a classwide basis enables the court to reduce transaction costs, particularly attorneys' fees, thereby maximizing available resources to compensate injured claimants").

All of this expense, moreover, does not make the adjudicatory process more fair or rational. On the contrary, it potentially leads to inconsistent results in identical cases, with outcomes determined more by the locale in which a case is tried or by the effectiveness of counsel in one proceeding compared to the next. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 907. Nor can it even be said of this process that it ends up treating individual plaintiffs well: the increasing delays and inconsistent judgments caused by separate proceedings only undermine a plaintiff's confidence in, and respect for, the system. *See, e.g., Cimino*, 751 F. Supp. at 666 (individual damages trials in asbestos cases will mean that "these cases cannot be tried").

In a similar, though more modest, vein, mandatory class actions also promote the systemic interest in settle-

ment, long regarded as the preferable way to resolve disputes. *See, e.g., Marek v. Chesny*, 473 U.S. 1, 10 (1985) ("[Fed. R. Civ. P. 68] expresses a clear policy of favoring settlement"); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."). If a defendant can conclude its exposure in a single, comprehensive proceeding, settlement will be far more likely than if, after settling a class action, the defendant may still have to litigate the same issue with numerous opt out parties. Indeed, in the MDL 633 case, the district court expressly indicated that it would have been "highly unlikely" for the case to have settled if the defendants had to face the prospect of future suits by parties who were able to opt out. Pet. App. 52a.

d. A reasonable weighing of these three factors tilts decidedly against a constitutional right to opt out of any properly certified class action, regardless of whether it includes monetary claims. The paramount interest of unnamed plaintiff class members in avoiding an erroneous deprivation of their claims is fully protected by a meaningful and enforceable right to adequate representation. On the other hand, the widely shared systemic interests in avoiding duplicative proceedings with potentially inconsistent results, and in increasing the likelihood of settlement, strongly support the constitutionality of mandatory class actions under Rule 23(b)(1) and (b)(2) for both monetary and injunctive relief.[16]

[16] The due process analysis applicable to defendant class actions raises different considerations. As this Court noted in *Shutts*, unlike plaintiff class members, a defendant may be required "to respond in damages or to comply with some other form of remedy imposed by the court." 472 U.S. at 808. *Cf.* Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1296 (1975) ("whatever the mathematics, there is a human difference between losing what one has and not getting what one wants"). Moreover, the guarantee of adequate representation may require additional measures in a defendant class action, because, at least initially, the named defendants, unlike named plaintiffs, do not select themselves, but are selected by their adversaries. *See* Z. Chafee, *Some Problems of Equity* 237-38 (U. Mich. L. 1950).

This conclusion is strongly supported by the actual practices of the lower federal courts, which deal with class action litigation on a daily basis. Those courts uniformly agree that, where a class can be certified either as mandatory ((b)(1) or (b)(2)), or with an opt out right ((b)(3)), the mandatory action is preferred precisely because "the judgment will have *res judicata* effect as to all the class." *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989). *See, e.g., Kyriazi v. Western Elec. Co.*, 647 F.2d at 393; *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249, 253 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976). *See generally* 3B J. Moore et al., *Moore's Federal Practice* ¶ 23.31[3] at 23-236 (2d ed. 1993); 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1772, at 424-26 (1986). Indeed, in recent years, federal courts faced with an explosion of duplicative litigation have come to rely increasingly on the "limited fund" concept of Rule 23(b)(1)(B) to certify mandatory class actions in cases where (b)(3) actions might previously have been used. *See, e.g., In re Granada Partnership Sec. Litig.*, 803 F. Supp. 1236 (S.D. Tex. 1992); *In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32 (E. & S.D.N.Y. 1990); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703 (E.D. Mich. 1985). These experience-based conclusions are entitled to respect.

Finally, while it is true that many monetary claims arise in (b)(3) class actions, where Rule 23 already provides opt out rights, that is no reason to erode the efficient and effective use of (b)(1) and (b)(2) class actions, like this one, that properly include such monetary claims. Moreover, given the current pressures on federal court dockets, it makes little sense to foreclose reconsideration of the (b)(3) opt out right. The drafters of the

Federal Rules adopted that provision almost thirty years ago, when the effects of mass torts (and similar damages claims) on the federal courts could not have been anticipated. As then-Judge Frankel wrote when the current version of Rule 23 was adopted:

> There is nothing magic or constitutionally vital about the "true" class action or *in rem* proceedings except that the terms and their implications are matters of old habit for us. Underlying those familiar concepts are familiar notions of necessity or convenience or "practicability" weighed with or against basic principles of fairness. Such notions are flexible and adaptable to the emerging needs of an increasingly complex community. They may be sensibly and justly applied in ways that will make it entirely fair to render judgments "binding" upon absent parties in actions that were formerly . . . non-binding.

M. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 46 (1967) (footnote omitted). Those words are even more apt today.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JOHN C. CHRISTIE, JR.
PATRICK J. ROACH
BELL, BOYD & LLOYD
1615 L Street, N.W.
Washington, DC 20036
Attorneys for Petitioners Chicago Title Insurance Co., Ticor Title Insurance Co., and Security Union Title Insurance Co.

JOHN F. GRAYBEAL
ROBERT H. TILLER
PARKER, POE, ADAMS & BERNSTEIN
One Exchange Plaza
Raleigh, NC 27602-0389
Attorneys for Petitioner Lawyers Title Insurance Corp.

DAVID M. FOSTER
MICHAEL P. GOGGIN
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
Attorneys for Petitioner Stewart Title Guaranty Company

JOEL I. KLEIN *
RICHARD G. TARANTO
KLEIN, FARR, SMITH & TARANTO
2445 M Street, N.W.
Washington, DC 20037-1435
(202) 775-0184
Attorneys for All Petitioners

FRANK D. TATUM, JR.
PAUL J. LAVERONI
JOHN F. YOUNG
COOLEY GODWARD CASTRO HUDDLESON & TATUM
1 Maritime Plaza
San Francisco, CA 94111
Attorneys for Petitioner First American Title Insurance Company

* Counsel of Record for All Petitioners